Supreme Court, U.S.
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No. 04 508

In The
Supreme Court of the United States

JOHNNA E. BURTON,

Petitioner,

vs.

BUCKNER CHILDREN & FAMILY SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a Rule 56 summary judgment setting involving an employment discrimination case, is it improper for an appellate or trial court to substitute its opinion for that of the ultimate factfinder and conclude on its own volition that inconsistent and conflicting testimony by the movant-employer's representatives reference "two completely separate time periods that they were discussing", when one witness maintained he did not have ongoing conversations with regarding Burton's performance and the other manager who allegedly did not receive any call stated he did, and therefore an equally plausible conclusion could be drawn, i.e., that one or all of the employer's witnesses were not worthy of belief?

2. In an employment discrimination case, is it error to grant a Rule 56 summary judgment motion when the summary judgment evidence demonstrates equally plausible factual inferences from proven facts, being either discrimination or no discrimination, especially when the employer's affiants have demonstrated inconsistent positions regarding the stated reason for discharge and the affidavit assertions are belied by the employer's affiant's handwritten notes made earlier in time, thereby at least establishing the requisite suspicion of mendacity?

3. Does the Fifth Circuit's opinion in *Burton* which resolves credibility issues in favor of the movant-employer (by explaining the inconsistencies away as unsupported by the record [there was support] or so trivial as to be immaterial), ignore this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) which: (1) clearly places credibility determinations within the province of the factfinder; (2) permits the

QUESTIONS PRESENTED FOR REVIEW – Continued

factfinder to infer the ultimate finding of unlawful discrimination based on the *prima facie* case combined with sufficient evidence of the falsity of the stated reason for the employment action and (3) requires no additional independent evidence of discrimination?

4. Do the conflicting opinions of the Fifth Circuit regarding the plaintiff's burden in the summary judgment setting involving an employment discrimination case undermine the principle of *stare decisis* to the point it deprives litigants of the ability to accurately consider the merits of liability?

5. Whether the Trial Court and the Appellate Court in a FMLA retaliation/discrimination case can characterize direct evidence of improper motive as trivial or non-probative, particularly when it is authored by the same individuals who contend that the employee was discharged for performance issues notwithstanding the direct evidence of improper motive?

6. Whether this Court's opinion in *Desert Palace Inc. v. Costa* places the same burden on an employer provided by 29 C.F.R. § 825.220(c) which, when coupled with unrefuted evidence of mixed motive, obliges the employer to prove the same decision would have been made without the improper influence, which, when coupled with direct evidence always renders the issue one of a question of fact?

7. Whether a Plaintiff who brings a FMLA retaliation case and presents direct evidence of improper motive in the summary judgment setting is entitled to a denial of the motion for summary judgment in light of this Court's rulings in *Desert Palace* and *Reeves v. Sanderson Plumbing Products, Inc.*, and 29 C.F.R. § 825.220(c)?

QUESTIONS PRESENTED FOR REVIEW – Continued

8. Whether the Fifth Circuit comports with this Court's rulings in *Reeves v. Sanderson Plumbing Products, Inc.*, *Anderson v. Liberty Lobby, Inc.*, and *Lytle v. Household Manufacturing, Inc.*, inasmuch as in this case and perhaps many others, the Fifth Circuit makes credibility determinations, weighs evidence, performs functions of the factfinder and when weighing the evidence concludes the evidence is non-existent, trivial and non-probative without any explanation and not referencing any of the evidence offered in opposition, which in this case consisted of 62 pages of evidence?

9. In the summary judgment forum are the circuit courts, which reject the non-movant's evidence, required to articulate the evidence offered and the reasons for the conclusion the non-movant's evidence is so weak it could never be probative of unlawful discrimination, in other words, should the trial court and circuit court set out the evidence offered by the non-movant and state why the evidence is not material or so weak it could never raise a material issue of fact?

10. When comparator evidence is used as a form of circumstantial evidence to establish discrimination, must the comparable employee be involved in nearly identical circumstances in order for the evidence to be received and considered?

PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceedings in this case in the United States Court of Appeals for the Fifth Circuit:

1. Johnna E. Burton, Appellant-Petitioner
2. John E. Wall, Jr., Attorney for Appellant-Petitioner
3. Buckner Children & Family Services, Inc., Appellee-Respondent
4. Simon D. Whiting, Esq., and Joann N. Wilkins, Esq. and the law firm of Burford & Ryburn, Attorneys for Appellee-Respondent

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of the Respondent. The Fifth Circuit's July 13, 2004 opinion is printed here as App. 1-4. The District Court's May 8, 2003 memorandum opinion and order are printed here as App. 5-18. Some relevant excerpts from the summary judgment evidence are printed here as App. 19-20. The Declaration of Johnna Burton is printed here as App. 21-24.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit entered on July 13, 2004.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

APPLICABLE CONSTITUTIONAL PROVISIONS, RULES AND STATUTES

1. The rules applicable to this case are as follows:

Federal Rule of Civil Procedure 56

Rule 56. Summary Judgment

. . . .

> **(c) Motion and Proceedings Thereon.** . . . The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .
>
> . . . .
>
> **(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise specified in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

2. The constitutional provision applicable to this case is as follows:

Constitution of the United States

Amendment VII – Civil Trials

In suits at common law, where the value of the controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved. . . . U.S.C.A. Const. Amend. VII (West 1987).

3. The statues applicable to this case are as follows:

Family and Medical Leave Act 29 U.S.C. § 2615

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual –

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

> **(3)** has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

Family and Medical Leave Act 29 C.F.R. § 825.220(c)

An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave . . . employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions . . .

Texas Labor Code § 21.001 Purposes:

The general purposes of this chapter are to:

(1) provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments (42 U.S.C. § 2000e *et seq.*);

(2) identify and create an authority that meets the criteria under 42 U.S.C. § 2000e-5(c) and 29 U.S.C. § 633;

(3) provide for the execution of the policies embodied in Title I of the Americans With Disabilities Act of 1990 and its subsequent amendments (42 U.S.C. § 12101 *et seq.*);

(4) secure for persons in this state, including persons with disabilities, freedom from discrimination in certain employment transactions, in order to protect their personal dignity;

(5) make available to the state the full productive capacities of persons in this state;

(6) avoid domestic strife and unrest in this state;

(7) preserve the public safety, health, and general welfare; and

(8) promote the interests, rights, and privileges of persons in this state.

Texas Labor Code § 21.051 Discrimination by Employer

An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer:

(1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or

(2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.

STATEMENT OF THE CASE

***Basis for Federal District Court Jurisdiction*:**

Petitioner, Johnna E. Burton ("Burton") brought suit against her former employer, Respondent, Buckner Children & Family Services, Inc., ("Buckner") pursuant to the Family & Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601, *et seq.* and the Texas Commission on Human Rights Act ("TCHRA"), Tex. Lab. Code Ann. § 21.001 claiming age discrimination. Jurisdiction was proper in the United

States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1331.

Facts Material to Consideration of the Questions Presented:

FMLA

Burton was a 5 year employee of Buckner at the time she was fired. In July 2000, Burton's generally good work attendance was derailed as a result of the medical condition of her daughter, Michelle. Burton's daughter had suffered emotionally and attempted suicide on two separate occasions. On each of the suicide attempts, Burton's daughter was hospitalized in critical condition for several days. Realizing something was seriously wrong with her daughter and that she needed to assist her daughter with her serious medical condition, Burton filed for intermittent FMLA on July 26, 2000. Burton was fired from her job as Director of Community Relations on October 25, 2000. The stated reason for discharge was poor performance. Buckner offered evidence from interested witnesses: Ken Hall (President), Felipe Garza (Director), Karen Bailey/Houston (V.P. Human Resources) JoAnn Cole (supervisor) Sandy Melton (Co-Worker) and Weldon McElreath (former supervisor). Buckner's stated reason for discharge was controverted by Burton's evidence and there was direct evidence of FMLA retaliation in the form of handwritten notes from Burton's supervisor (Cole) who, when listing Burton's "job failures" placed FMLA leaves at the top of the list. (App. 19-20).

TCHR[1]

[1] The TCHR is the equivalent of the ADEA inasmuch as Texas is a deferral state and as such receiving federal subsidy as a deferral state. The preamble to the Human Rights Act specifically states:

§ 21.0001. Purposes

The general purposes of this chapter are to:

(1) provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments (42 U.S.C. Section 2000e *et seq.*)

(2) identify and create an authority that meets the criteria under 42 U.S.C. Section 2000e-5(c) and 29 U.S.C. Section 633;

(3) provide for the execution of the policies embodied in Title I of the Americans With Disabilities Act of 1990 and its subsequent amendments (42 U.S.C. Section 12101 *et seq.*);

(4) secure for persons in this state, including persons with disabilities, freedom from discrimination in certain employment transactions, in order to protect their personal dignity;

(5) make available to the state the full productive capacities of persons in this state;

(6) avoid domestic strife and unrest in this state;

(7) preserve the public safety, health, and general welfare; and

(8) promote the interests, rights, and privileges of persons in this state.

§ 21.051 Discrimination by Employer

An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer:

(1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; and; or

(2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or

(Continued on following page)

It is undisputed that Burton was 56 years of age when terminated on October 25, 2000 (and was thus a member of the protected class and adversely affected by Defendant's decision).

The evidence also established that Burton was clearly qualified to perform the position because she had performed admirably by all accounts until she exercised FMLA and then after she was fired her responsibilities were assumed by two people who were 24 and 41 years of age.

The Trial Court erroneously explained away all of the Defendant's credibility issues claiming there was no inconsistency although differences were apparent and rejected the differences with explanations never advanced by Buckner to explain sharp differences on the stated reason for discharge as advanced by Buckner's interested witnesses. The Trial Court considered the evidence in the light most favorable to Buckner and explained away all of the inconsistencies. None of the courts below or Buckner ever addressed the list of alleged failures which specifically mentioned FMLA as a failure on the list of alleged reasons leading to Burton's discharge. Also, the evidence establishes that the stated reason for Burton's termination was false and pretext.

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tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT

1. The Fifth Circuit's opinion so confounds the burdens in a summary judgment setting involving alleged employment discrimination that the significance of *stare decisis* vanishes. The opinion ignores this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) regarding the quantum of proof required in an employment discrimination case. The opinion further contorts Fed. R. Civ. P. 56 to the point that all of the evidence is considered in the light most favorable to the movant and credibility questions are unilaterally attributed to explanations not sponsored by the movant without considering the possibility that it was mendacity or was probative of the suspicion of mendacity. The Trial Court and Fifth Circuit also failed to consider direct evidence in the 62 page summary judgment appendix that would ostensibly refute summary judgment, concluding all the evidence was trivial or could not be found in the record. Such deviation from the accepted and usual course of proceedings under Fed. R. Civ. P. 56 and the rules of law mandated by this Court, as well as Fifth Circuit precedent, leaves uncertain the role of the Trial Court, the viability of *Reeves*, the burden of the nonmovant in a summary judgment proceeding in an employment discrimination case and a litigant's ability to properly evaluate the unlawful conduct of the employer; therefore, review by this Court is warranted.

The Fifth Circuit's opinion in *Burton* is in direct contrast to this Court's holding in *Reeves v. Sanderson*

Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The *Burton* opinion further conflicts with Fifth Circuit precedent, as well as decisions from other circuit courts, including the First, Third, Fourth, Ninth and Tenth Circuits, which ostensibly follow *Reeves* on the quantum of proof required in a summary judgment proceeding involving an employment discrimination case. *See e.g., Russell v. McKinney Hospital Venture*, 235 F.3d 219, 223 (5th Cir. 2000); *Evans v. City of Bishop*, 238 F.3d 586, 590 (5th Cir. 2000); *Blow v. City of San Antonio*, 236 F.3d 293, 298 (5th Cir. 2001); *Ratliff v. City of Gainesville, Texas*, 256 F.3d 355 (5th Cir. 2001); *Fierros v. Texas Department of Health*, 274 F.3d 187 (5th Cir. 2001); *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000); *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115 (9th Cir. 2000); *Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253 (4th Cir. 2001); *Rivera-Rodriguez v. Frito Lay Snacks Caribean*, 265 F.3d 15 (1st Cir. 2001); and *Abramson v. William Patterson College of New Jersey*, 260 F.3d 265 (3rd Cir. 2001).

As followed by other circuits, and as this Court held in *Reeves*, "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves* at 530 U.S. at 148, 120 S.Ct. at 2109. This Court previously reasoned that "the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by suspicion of mendacity), together with the elements of the *prima facie* case, may suffice to show intentional discrimination." *Reeves*, 530 U.S. at 147, 120 S.Ct. at 2108, *citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 517, 113 S.Ct. 2742, 125

L.Ed.2d 407 (1993). Further, "rejection of the Defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . [and] '[n]o additional proof of discrimination is *required.*" (emphasis in original); *St. Mary's,* 509 U.S. at 511, 113 S.Ct. at 2747-50; *see also Reeves,* 530 U.S. at 147, 120 S.Ct. at 2108. This Court made it clear that proof of the falsity of the employer's stated reason for the adverse employment action is a form of circumstantial evidence that is probative of intentional discrimination. *Reeves,* 530 U.S. at 147, 120 S.Ct. at 2108, *citing St. Mary's*, 509 U.S. at 517, 113 S.Ct. 2742.

In reiterating the *St. Mary* standard, this Court in *Reeves* recognized that there may be some instances where no rational factfinder could conclude that discrimination occurred even when a *prima facie* case has been established and there is sufficient evidence to reject the stated explanation. *Reeves,* 530 U.S. at 148, 120 S.Ct. at 2109. For instance: (1) if the record revealed as a matter of law some nondiscriminatory reason for the decision; or (2) if the employee created only a weak issue of fact as to the falsity of the employer's explanation and there was "abundant and uncontroverted independent evidence" that no discrimination occurred. *Id.*

Such inadequacies were not present in *Burton*. Nonetheless, in contrast to clear precedent, the Fifth Circuit affirmed summary judgment, rejecting Burton's age discrimination and FMLA retaliation claims in favor of the employer's story, ignoring Burton's evidence of the falsity of the stated reason for termination and resolving the obvious credibility questions in favor of the movant-employer. *See* App. 1-4. The Trial Court and Fifth Circuit also departed from *Reeves* by giving credence to the testimony offered by

Buckner from interested witnesses that was contradictory and impeached contrary to *Reeves'* requirement to the contrary. *Id.* at 2110.

Burton stated in her Declaration that the stated reason for the termination was age and FMLA discrimination *See* App. 21-24. As Burton explained in her Declaration, it was only after she applied for intermittent FMLA that her work was criticized. Buckner claimed there was progressive discipline initiated before the exercise of FMLA but, Burton's supervisor had compiled a list of the "specific job failures" in response to an e-mail from the Vice President of Human Resources which listed 32 FMLA absences on the paper with the first and second enumerated job failures being FMLA leave (App. 19-20) and before any criticism or alleged job failure were noted to have occurred. A jury could have easily inferred that "job failures" found in Cole's notes were direct evidence for the termination and job failures were only asserted as a recent fabrication. This after-the-fact "reason" was also directly belied by the evidence.

If that were not enough, Buckner's testimony conflicted about most every stage of the termination process, including the stated reason. The evidence of the falsity of the stated reason and Buckner's lack of credibility clearly should have precluded summary judgment. Instead, the Fifth Circuit resolved the credibility issues in favor of Buckner, somehow finding it appropriate to conclude that the inconsistencies were either unsupported by the record or *so trivial* as to be immaterial. (App. 3) Burton would suggest the 62 page appendix which was offered in evidence and not described by either court below was anything but trivial; rather two pages were a smoking gun that never was mentioned in any of the opinions below. Moreover the

Movant's affiants were deposed before the creation of their affidavits and there were numerous inconsistencies between all of the interested witnesses. Some of Buckner's credibility problems regarding material issues in this case included:

✓ Side by side, there are sharply different accounts of what transpired. Garza said in his deposition he was called by Hall (R. 209). Hall said the exact opposite that he did not have ongoing conversations with Garza about what to do about Burton (R. 199). In fact contrary to Hall's deposition, Garza said he was getting so many calls from the President [Hall] he [Garza] did not want to become the issue.

✓ In addition to the fact that Burton was fired just three months after requesting FMLA leave and after working for the Defendant for over five years, evidence of discrimination is also found in the alleged reasons for Burton's termination. Mr. McElreath and Mr. Mercer provided letters of reference in June of 2000 which are laced with comments such as " . . . it would not be an overstatement to mention that thousands of lives, hundreds of thousands of dollars and numerous strategic partnerships came about because of her efforts. Johnna is an unsung hero in Buckner's success story." (R. 185-87)

✓ The first piece of disciplinary paperwork was allegedly prepared by JoAnn Cole bearing the date of July 24, 2000. However, Ms. Burton was never asked to sign the document. As is noted in Mr. Hall's earlier Memo to Ms. Burton of March 31, 2000, Burton was provided the opportunity to sign, acknowledging receipt and date. The Defendant provided no explanation for the lack of date and signature on the Memo of July 24, 2000. In fact, the lack of

date and signature defies the remarks of Garza on Page 8, Lines 10-15 of his sworn deposition which states discipline memos are presented to the employee for signature. Moreover, Buckner did not claim that it was provided to Burton on July 24, 2000. However, in the Trial Court's Opinion Granting Defendant's Motion for Summary Judgment; Page 7 concludes that it was provided to Ms. Burton on that date. What the Defendant's Appendix actually said was the meeting was also documented in a July 24, 2000, Memoranda and provided to Ms. Burton. Nowhere does the evidence state as the Trial Court concluded that it was given to Burton July 24, 2000.

✓ A review of the Memo and comparison to the e-mail of Karen Bailey to JoAnn Cole dated November 28, 2000, requesting among other things, dates of discussion with Ms. Burton, reveals in Ms. Cole's 11/28/2000 response to Bailey that the first meeting with Ms. Burton occurred on August 7, 2000, rather than on July 24, 2000, as alleged by Defendant in their Motion for Summary Judgment. At the top of this Memo, the first items of concern by Ms. Cole when addressing Ms. Bailey's request for job "failures" attributes Ms. Burton's failures to nine days of FMLA. Some reasonable factfinders might consider this a "smoking gun." If the July 24, 2000, document existed on that date as was concluded by the Trial Court, then certainly in response to such a specific inquiry from Ms. Bailey, Ms. Cole would have put that at the top of her list.

✓ Next the Trial Court erroneously concluded that once again Cole met with Burton and that the meeting was documented and provided in a Memo to Burton on August 4, 2000. Of course, the August 4, 2000, Memo states that Ms. Burton did not, for an unexplained reason, feel emotionally prepared to work. Knowing that Ms.

Burton's daughter had just recently attempted suicide, the Defendants demonstrated their kindness and consideration for Family Medical Leave by ratcheting up the pressure. For some strange reason, although not explained by the Defendants, and overlooked by the Trial Court, the Defendant reverted or probably more accurately instituted for the first time, the traditional process of preparing discipline Memos and presenting it to Ms. Burton for signature on August 8, 2000. (R. 132) Of significance, although not appreciated by the Trial Court, this was the first time this practice was implemented, although previously reflected in Mr. Hall's epistle of March 31, 2000 and Garza's deposition. (R. 110 & 209) Of note, Ms. Burton was granted intermittent FMLA on August 4, 2000 four days prior to the first Memo signed by anyone. The August 7, 2000 Memo is allegedly authored by the same JoAnn Cole who did not obtain a signature on any of the previous Memos. For the first time, which coincidently falls on the heels of the FMLA grant, Cole puts in the Memo that a failure to meet expectations or adhere to company policies will lead to further disciplinary actions. A reasonable factfinder could conclude that was the first evidence of any jeopardy of losing Burton's job and that the prior Memos were compiled after the fact, due to the absence of signature and date lines to demonstrate that their alleged performance issues predated the need for FMLA. That could certainly be an easy conclusion to reach in light of Ms. Cole's response to Karen Bailey that chronicles the first meeting as having occurred August 7, 2000. (App. 19) The second meeting on Ms. Cole's handwritten report is chronicled as having occurred September 7, 2000. The only references to written warnings follow the application and receipt of FMLA.

✓ The Trial Court concluded that on July 26, 2000 Cole learned of Burton's request for FMLA leave. (App. 12) Nevertheless, when asked in her deposition "when did you first learn that she [Burton] was going to need intermittent Family Medical Leave?" Her answer was "in July, towards the end of July." Unfortunately, Ms. Cole did not provide the Trial Court nor counsel any explanation for her sudden memory improvement nor a corrigendum to her deposition. When compared to Cole's notes to Bailey in November, 2000, a factfinder could easily conclude that the notice was received prior to July 26, because Ms. Burton was not at work at all on July 26. (App. 19)

✓ No doubt Burton was treated differently than non FMLA recipients. A review of JoAnn Cole's deposition shows that Cole received no documentation for failing to respond to e-mails. (R. 220-1) Also as voiced by Ms. Burton, the timeliness of returning phone calls and messages was petty. (R. 191) Karen Bailey in her deposition stated that she had never known anyone other than Ms. Burton to be criticized for not returning phone calls as promptly as liked. (R. 225)

The above examples constitute powerful evidence that the stated reason for termination was false and discriminatory because Buckner's representatives exhibited a complete lack of veracity on the issues most material to this case, i.e., why Burton was allegedly terminated, how and who made the decision. Granting summary judgment was wrong in this case in light of *Reeves* and its progeny. Nevertheless, such authorities were abandoned and the Fifth Circuit and Trial Court instead fashioned their opinions in such a way that such inconsistencies were the result of innocent differences in memory or minor differentiations in language (an inference not suggested by

Buckner). This *ab initio* explanation of contradictions absolved Buckner of wrongdoing, even though an equally, more probable, inference that could have been drawn from these inconsistencies was that Buckner's representatives were concealing discrimination and retaliation and could not mold their variant stories into uniformity. Summary judgment should never have been granted in such a case. That it was, leaves in serious doubt the adherence to *Reeves* in the Fifth Circuit, the role of the Trial Courts in evaluating evidence of credibility and the sufficiency of the evidence required to defeat summary judgment in an employment discrimination case.

Upon review of the summary judgment evidence, this case involved a credibility question between Burton and Buckner, and required a sorting of the inconsistencies between each of Buckner's representatives. The outcome of each claim should have depended on which witnesses the jury believed, as opposed to the court. The impropriety of the Fifth Circuit's effort at credibility assessment is only further confirmed by a review of the Civil Pattern Jury Instructions which state in relevant part:

> 1. [Y]ou the jury are the judges of facts.
>
> 2. In determining the weight to give the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time, the witness said or did something, or failed to say or do something, that was different from the testimony the witness gave before you during the trial.
>
> 3. [I]f a witness has made a misstatement, you need to consider whether that misstatement was

> an intentional falsehood *or* simply an innocent lapse of memory; and the significance of that may depend on whether it has to do with an *important* fact or with only an unimportant detail.
>
> 4. The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence, *you believe that single witness.*

(Emphasis added). *See* Pattern Jury Instructions, Fifth Circuit (Civil Cases), Section 3.1 (West 2001).

The Fifth Circuit usurped what should have been the role of a jury, and in so doing, deprived Burton of her Seventh Amendment Constitutional right to a jury trial. Had the Fifth Circuit abided by *Reeves*, the issue of whether Burton suffered discrimination would have been properly left for the jury to resolve. Instead, after resolving the disputed fact issues in favor of Buckner and rejecting Burton's affidavit testimony *as trivial and conclusory*, the Fifth Circuit in affirming summary judgment, eviscerated *Reeves* and crafted a new and heightened summary judgment burden for non-movant-employees in a discrimination case.

The *Burton* standard directly conflicts with *Reeves*. That *Burton* is an unpublished opinion matters not. *Burton* warrants review because in the current era, unpublished opinions are widely available for review online and provide guidance and persuasion (in addition to published opinions) as to rules of law which will be followed. *See* Fifth Circuit Local Rule 47.5.4 (although not generally precedent, an unpublished opinion may be persuasive and may be cited if a copy is provided). A reading of *Burton* demonstrates the denigration of *Reeves*

and obscures what is the sufficiency of proof required by an employee-nonmovant to survive a Rule 56 summary judgment motion. In short, the fundamental purpose of *stare decisis* serves to define the parameters of when one can expect to survive summary disposition and when they cannot. Under *Burton*, the concept has metamorphasized into a moving target.

2. The Fifth Circuit has issued an opinion which improperly applies the Court's opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000). To state the Circuit Court does not have to delineate the evidence offered by the non-movant and will not explain what is in the record and will not state why the evidence is trivial or not material, deludes the requirements of *Reeves*. The courts below merely concluded the evidence was not present or essentially carried no weight. The lower courts should be required to describe the facts offered by the nonmovant and specify why the evidence is nonprobative. This departure from accepted and usual course of proceedings using Fed. R. Civ. P. 56 warrants review by this Court.

In addition to chiseling away at the essence of *Reeves*, the *Burton* opinion machinates the Court's opinion in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

In *Celotex*, this Court explained that a nonmovant in a summary judgment proceeding, who bears the burden of proof on the issues in question, may not rely on unsupported claims or defenses in the pleadings, but in responding to a motion for summary judgment is required "to go

beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file', designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex* 477 U.S. at 323-324, 106 S.Ct. at 2553, *quoting* Fed. R. Civ. P. 56(e).

As such, in an employment discrimination case, the affidavit testimony of the nonmovant-employee which sets forth specific facts showing a genuine issue for trial suffices to defeat summary judgment, particularly with an affidavit such as Burton's which specified that, Burton was fired two days before recertification of continued FMLA leave and a day or so after the most recent authorized leave; *see also Vance v. Union Planters Corp.*, 209 F.3d 438, 442 & n.3 (5th Cir. 2000) (even if evidence consists solely of plaintiff's testimony, discrimination may be established); *Fierros v. Texas Department of Health*, 274 F.3d 187 (5th Cir. 2001) (2001 WL 1484868 at *6) (affidavit testimony regarding discriminatory statements made by the employer alone precludes summary judgment and constitutes direct evidence, not merely a "subjective belief").

In contrast, the Fifth Circuit in *Burton* cited *Reeves* for the notion that "unsubstantiated assertions are not competent summary judgment evidence" and from there saw fit to reject Burton's evidence of mendacity and her direct evidence of FMLA retaliation *See* App. 3. In other words, the Fifth Circuit diluted the well-settled holding of *Reeves* that the court should review all the evidence in the record. Here the Fifth Circuit did not mention any of Burton's evidence or why it was not material or why it was considered trivial.

The position that there are far too many employment disputes filed with the courts could be easily resolved with guidance from this Court. The legal system can take control of its own engine. If this Court were to delineate what is and what is not a case that would likely survive summary judgment, it would provide guidance to the parties to the dispute. Such review in the summary judgment setting would eliminate the existence of the moving target. Unfortunately, statistics lead to but one conclusion; there are significant numbers of meritorious cases which are summarily disposed of, which in the eyes of a reasonably prudent factfinder should survive summary judgment. *See* Clemont, Kevin M. and Schwab, Stewart Jon, "How Employment Discrimination Plaintiffs Fare in Federal Court" (2004). Journal of Empirical Legal Studies, Vol. 1, No. 2, pp. 429-458, July 2004 http://ssrn.com/abstract=557851.

The absence of predictability, coupled with the apparent antagonism towards discrimination suits warrants review to provide the legal system the ability to self limit, if necessary. The factfinders as stated by this Court in *St. Mary's Honor Center v. Hicks*, as well as *Reeves v. Sanderson Plumbing Products, Inc.*, are to determine the very issues unfortunately decided by the Trial Court and the circuit court in this case. Moreover, the Trial Court made inferences from the evidence, which were not the only inferences that could be logically drawn from the facts proven. Somehow, the Trial Court concluded that the sharp inconsistencies in the testimony of Ken Hall, Felipe Garza, JoAnn Cole, and Kay Houston were to be given credence because the witnesses allegedly were thinking of differing periods of time. For instance, Ken Hall was asked: "Did you ever speak to Felipe Garza about the

reasons for Johnna Burton's termination or the facts giving rise to the discharge?" Answer: "No". To the contrary, Felipe Garza testified that the reason he discharged Burton was because he was concerned of receiving another call from Hall and the person to be terminated might be him rather than Burton. Conflicting with those statements is the e-mail requesting a list of the "job failures" which led to the discharge. JoAnn Cole, Burton's Supervisor, allegedly was responsible for the documentation of Burton's "job failures". Although maintaining that documentation and counseling of Burton commenced prior to her exercise of intermittent FMLA, Cole's handwritten notes belie the assertion. The first time according to Cole's notes that any meetings regarding alleged deficiencies occurred on August 7, 2000. (App. 19). Surely if other documentation existed, it would have existed by November 28, 2000 when the handwritten list is indicated to have been prepared. Also requested were specific tasks Burton allegedly failed to complete or did not complete as assigned. The first date alleged to have resulted in written warning occurred September 7, 2000. Nevertheless, Cole and Buckner sponsored write-ups which purported to precede those dates. Why the Fifth Circuit and the Trial Court did not consider this evidence in light of this Court's pronouncement in *Reeves*, that they are obliged to review the entire record, remains unexplained. Those two sheets of paper alone should have prevented the granting of summary judgment with regard to the FMLA claim.

The Fifth Circuit went on to conclude that Burton's evidence of disparate treatment or more harsh discipline for her than others was without merit because it did not occur under nearly identical circumstances. Burton had

demonstrated that JoAnn Cole had committed "job failures" and nevertheless received no discipline.

As this Court noted in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) precise equivalence of the allegations of misconduct are not required. The issue is comparable severity. Nevertheless, the Fifth Circuit maintained that nearly identical circumstances must exist when comparing the discipline applied to Burton and not applied to JoAnn Cole. It could clearly be concluded as noted by the Sixth Circuit that nearly identical circumstances will rarely exist. *Ercegovitch v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir 1998) If the non-protected employee to whom the Plaintiff compares himself or herself must be identically situated to the Plaintiff in every single aspect of their employment, a plaintiff whose job responsibilities are unique to his or her position will *never* successfully establish a *prima facie* case (absent direct evidence of discrimination). 54 F.3d at 353. Rather as this Court noted, the concept of comparator's must be a fluid one that is adapted to the particular context in which the evidence is assessed. *See Ornelas v. United States*, 116 S.Ct. 1657 (1996) ("reasonable suspicion and probable cause are fluid concepts that take their substantive content from the particular events in which the standards are being assessed.") In this case, and many others, following *McDonald v. Santa Fe Trail Transportation* the Fifth Circuit has required near identical circumstances to use comparator's evidence as proof of discrimination.

At one time, the Fifth Circuit noted summary judgments should be granted only sparingly in Title VII cases, *Jones v. Western Geophysicals Co. of America*, 669 F.2d 280, 283 (5th Cir. 1982). Having said that, it is now clear from the statistical information provided by Professors

Clermont, Eisenberg and Schwab that the principle has suffered tergiversation.

As noted by Professors Clermont, Eisenberg and Schwab in the Fifth Circuit, only 4.65 percent of all plaintiffs prevail on appeal. Conversely, 53.85 defendants prevail on appeal. Whether the trend is anti-plaintiff or the absence of clear predictability, this provides the strength for Burton's argument. The deposition testimony of the decision makers in this case was particularly problematic. Though the deposition testimony of the purported decision makers in this case, conflicted on every point except that Burton was absent due to intermittent FMLA, the courts below accepted the conflicting testimony of interested witnesses. The conflicts provided serious doubt as to whether any of the actors were forthright regarding the methodology and usage of progressive discipline. Moreover, the contrasting deposition testimony of Buckner's witnesses, conflicted on who and how the various actors provided input on the decision making process which led to the termination of Burton. Although Felipe Garza maintained that he alone made the decision, Ken Hall, according to Garza, no doubt had some input into the situation. With Buckner's witnesses having such difficulty with the practice and methodology that led to Burton's discharge, one could clearly infer that none of them were forthright regarding the process and that it was all a ruse to conceal FMLA and/or age discrimination.

Burton would suggest that when all of the actors vary with their descriptions over the issues, that is another form of circumstantial evidence which would give rise to the inference of discrimination following the establishment of a *prima facie* case. There is no doubt that Burton had exercised intermittent FMLA, that she suffered adverse

employment action and that she was terminated. The only question that remained was why. Considering the Code of Federal Regulation requirement that exercise of FMLA could never bear negatively in an employment decision, summary judgment should be denied with evidence of such clearly probative value. The cross-examination of Buckner's "decision makers" left an obvious conflict and left in ultimate doubt the real process and what were the purported reasons for the decision to terminate. Against that backdrop, Burton offered evidence that she was regarded by her supervisors as an unsung hero in Buckner's success story. Burton also offered in summary judgment evidence, another letter in June, 2000 authored by supervisors "I must be diligent in my documentation that the outstanding growth and improvement in the public relations and community services programs resulted from the commitment and dedication efforts of Johnna Burton with minimal support from other staff." *Weldon McElreath, June 22, 2000.* The Trial Court dismissed the letters of recommendation as not probative because they were not helpful in determining Burton's job performance during the complained of period. (App. 10) The letters were written during the period of the alleged complaint. Also although there was conflict regarding who assumed the responsibilities of Burton, the Trial Court concluded that it was a person of age 41, even though there was some question as to who precisely assumed Burton's roles. (App. 10) The court also concluded that plaintiff's performance appraisal completed in February, 2000 was not probative of pretext regarding the alleged complaints of performance because it predated "most" of the performance issues. It was probative to show that the assertion that the performance issues predated FMLA was a fabrication. The court in its factfinding role, dismissed the evidence,

although others might not. The Trial Court also claimed that the plaintiff made a vague attempt to show pretext by stating the defendant's evidence was not credible. In sum, all of the evidence that was offered by Burton was considered in a light most favorable to the movant. All inferences to be drawn from the evidence were drawn in favor of the movant. The evidence that Burton offered was not considered, not mentioned or was explained away by the Trial Court as a memory failure. A factfinder could just as easily infer mendacity and therefore summary judgment was improper.

The Fifth Circuit's unwillingness to adopt some of the improvident factfinding and evidence weighing conducted by the Trial Court provided differing explanations for affirmance. The circuit court claimed that Burton's evidence were conclusional allegations and speculation. (App. 2) The circuit court also contended that Burton's allegations of discrepancies in Buckner's summary judgment evidence were either unsupported by the record or so trivial as to be immaterial. The circuit court provided no explanation as to how it reached that conclusion notwithstanding the existence of Burton's Declaration, the numerous inconsistencies found in the depositions as pointed out for the Trial Court and the circuit court and the handwritten notations listing FMLA rights as a "job failure". Whatever the reason for the antagonism towards employment cases that appears to exist in the Fifth Circuit, that antagonism or difficulty in dealing with the standards for summary judgment can be resolved by review of this case and a requirement that the Trial Court and circuit court delineate the non-movant's evidence and explain why it is insufficient to establish the fact issues.

CONCLUSION

The *Burton* opinion exemplifies the need for guidance for courts to follow in determining which claims are appropriate for summary judgment in an employment discrimination case. Far from a fact specific ruling, the *Burton* opinion is clearly an aberration from the accepted and usual standards in a summary judgment proceeding found in Rule 56. Further, the opinion deviates from this Court's decision in *Reeves,* and leaves uncertain the role of the Trial Courts in evaluating evidence and making credibility assessments. Left in obscurity is the amount of proof required by the nonmovant-employee to defeat summary judgment and the question of whether *Reeves* requires a review of the entire record from the non-movant in the most favorable light, drawing all reasonable inferences in favor of the non-moving party, but making no credibility determinations or weighing any evidence. *Id.*

To provide some vitality to the concept of *stare decisis*, and some level of predictability to employee/employer rights, review by this Court is warranted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-10960
Summary Calendar

JOHNNA E. BURTON,

Plaintiff-Appellant,

versus

BUCKNER CHILDREN AND FAMILY SERVICES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:02-CV-415-P

(Filed July 13, 2004)

Before REAVLEY, JONES and PRADO, Circuit Judges.

PER CURIAM:*

Buckner Children and Family Services, Inc. (Buckner) hired Johnna Burton (Burton) as a special events coordinator in 1995 and fired her in 2000. Burton, who was more than 40 years old when she was fired, filed suit in a Texas court against Buckner alleging age discrimination under

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the Texas Commission on Human Rights Act (TCHRA) and retaliation for using leave under the federal Family Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.* Buckner removed the case to federal court on grounds that the FMLA claims presented a federal question. 28 U.S.C. § 1331.

The district court granted summary judgment for Buckner on grounds that Burton was fired for a legitimate nondiscriminatory reason and not because of age discrimination or in retaliation for her exercise of her FMLA rights. The court reasoned that Burton's attempts to contest Buckner's summary judgment evidence concerning age discrimination were vague and without foundation. The court also concluded that Burton failed to establish a *prima facie* case of retaliation under the FMLA, and that even if she had, Buckner had established a legitimate nonretaliatory reason for dismissing her. We affirm.

"Summary judgment is reviewed *de novo,* under the same standards the district court applies." *Amburgey v. Corhart Refractories Corp.,* 936 F.2d 805, 809 (5th Cir. 1991). Summary judgment is proper when, viewing the evidence in the light most favorable to the non-movant, "'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting FED. R. CIV. P. 56(c)). We agree with the district court that Burton's conclusional allegations and speculation were insufficient to establish a genuinely contested issue of material fact. *See Michaels v. Avitech, Inc.,* 202 F.3d 746, 754-55 (5th Cir. 2000).

Buchner supported its motion for summary judgment with affidavits and documents indicating that Burton was dismissed for inadequate performance.

Burton's allegations of discrepancies in Buckner's summary judgment evidence were either unsupported by the record or so trivial as to be immaterial. *See Michaels,* 202 F.3d at 754-55 (mere conclusions and speculation inadequate to defeat summary judgment motion); *see also Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 148 (2000) (noting that "employer would be entitled to judgment as a matter of law [if] plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred"); *Moore v. Eli Lilly & Co.,* 990 F.2d 812, 815-16 (5th Cir. 1993) (plaintiff must do more than cast superficial doubt on employer's proffered reason for dismissal). Summary judgment was proper on the age-discrimination claims.

To support her claims of discrimination for exercising her rights under the FMLA, Burton was required to show initially that "(1) she was protected under the FMLA; (2) she suffered an adverse employment decision; and either (3a) that she was treated less favorably than an employee who had not requested leave under the FMLA; or (3b) the adverse decision was made because she took FMLA leave." *Hunt v. Rapides Healthcare Sys. L.L.C.,* 277 F.3d 757, 768 (5th Cir. 2001). As noted by the district court, Burton pointed to no summary judgment evidence that "she was treated less favorably than an employee who had not requested leave under the FMLA; or [that] the adverse decision was made because she took FMLA leave." *Hunt,* 277 F.3d at 768. Her references to the treatment of fellow employee JoAnn Cole did not show either that Cole had never used FMLA leave or that Cole's infraction was "nearly identical" to the infractions for which Burton was

dismissed. *See Wallace v. Methodist Hosp. System,* 271 F.3d 212, 220-21 (5th Cir. 2001) (compared employee's conduct must be "nearly identical" to plaintiff's). Burton therefore did not make a *prima facie* case of discrimination under the FMLA.

Even had Burton made a *prima facie* case, her claim would fail because she did not create a genuinely contested issue of material fact with respect to Buckner's legitimate, non-discriminatory reason for dismissing her. *See Michaels v. Avitech, Inc.,* 202 F.3d at 754-55; *Moore,* 990 F.2d at 815-16. Summary judgment was proper on the FMLA claim.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT,
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOHNNA E. BURTON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	3:02-CV-0415-P
BUCKNER CHILDREN AND FAMILY SERVICES, INC.	§	
	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed May 8, 2003)

Now before the Court for consideration is Defendant's Motion for Summary Judgment filed April 4, 2003, with Response and Reply thereto. After a thorough review of the evidence, the pleadings, the parties' briefs, and the applicable law, for the reasons set forth below, the Court GRANTS Defendant's Motion for Summary Judgment.

BACKGROUND

Johnna Burton, ("Plaintiff" or "Burton") brought this claim against Buckner Children and Family Services, Inc. ("Defendant" or "Buckner") alleging that Defendant terminated Plaintiff on October 25, 2000 in violation of the Family & Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601, *et seq.* and the Texas Commission on Human Rights Act ("TCHRA"), TEX. LAB. CODE ANN. § 21.001, *et seq.* Plaintiff was hired as Special Events Coordinator for Buckner in 1995. Plaintiff coordinated various special events, including several community and fundraising

events while employed at Buckner. Plaintiff was well liked and had a good work history until 2000.

In January 2000, Burton met with Weldon McElreath, a Buckner consultant, wherein Plaintiff was upset and angry, and threatened to resign if she did not get secretarial help. D's App. at 27. Plaintiff then threatened that Buckner would be unable to run the special events program without her help because her friends and contacts would pull their support if she was not in charge. *Id.* This incident was documented by Sandy Melton Stephens ("Stephens"), Regional Director of Development for Buckner, on January 30, 2000.[1] D's App. at 29-30.

On March 29, 2000, Plaintiff met with Ken Hall, President and CEO of Buckner, and Karen Houston, the Buckner's Vice President of Human Resources and Quality Assurance. The meeting was held to address "Ms. Burton's failure to be a team player and convey a positive, united image about Buckner, her anger and frustration with her job, her failure to complete her job responsibilities, and her decision to pursue her own agenda for items not approved in Buckner's budget." D's App. at 32.

Defendant claims that Plaintiff was terminated due to consistent, documented performance problems. On at least eight separate occasions from January 2000 until October

[1] Plaintiff questions the credibility of Stephens' January 30, 2000 memo. Without providing a shred of evidence as support, Plaintiff asserts that a factfinder could easily infer that the memo was prepared in November 2000 when Stephens was asked to document events leading up to Burton's termination. Without evidence to the contrary, the Court declines to find a fact issue as to whether or not the document was prepared on the date shown.

2000, Plaintiff was given notice and opportunity to improve her job performance. D's M.S.J. Brief at 6.

On July 26, 2000 Plaintiff filed for FMLA leave to attend to the medical condition of her daughter. Burton's daughter had attempted suicide twice, after one of which occasions she was hospitalized and in critical condition. P's M.S.J. at 2.

Plaintiff was terminated on October 25, 2000. Plaintiff filed this suit claiming she was fired in violation of FMLA and TCHRA. Defendants subsequently filed this Motion for Summary Judgment.

DISCUSSION

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett.,* 477 U.S. 317, 323 (1986). The moving party bears the burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial, and of identifying those portions of the record that demonstrate such an absence. *Id.* at 323. However, all evidence and the reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962).

Once the party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party defending the motion for summary judgment cannot defeat the motion unless he provides specific facts that show the case presents a genuine issue of material fact, such that a reasonable jury might return a verdict in his favor. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986). Mere assertions of a factual dispute unsupported by probative evidence will not prevent a summary judgment. *Id.* at 248-50; *Abbot v. Equity Group, Inc.,* 2 F.3d 613, 619 (5th Cir. 1993). In other words, conclusory statements, speculation and unsubstantiated assertions will not suffice to defeat a motion for summary judgment. *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc).

If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he bears the burden of proof at trial, summary judgment is mandatory. *Celotex,* 477 U.S. at 322-24; *Washington v. Armstrong World Industries, Inc.,* 839 F.2d 1121, 1122 (5th Cir. 1988). A motion for summary judgment cannot be granted simply because there is no opposition, even if the failure to oppose it violates a local rule. *Hibernia Nat'l Bank v. Adminstracion Central Sociedad Anonima,* 776 F.3d 1277, 1279 (5th Cir. 1985). However, when the nonmovant fails to provide a response identifying the disputed issues of fact, the Court is entitled to accept the movant's description of the undisputed facts as *prima facie* evidence of its entitlement to judgment. *Eversly v. Mbank Dallas,* 843 F.2d 172, 173-174 (5th Cir. 1999);

Nordar Holdings, Inc. v. Western Sec. (USA) Ltd., No. 3:96-CV-0427-H, 1996 WL 739019, *2 (N.D. Tex. Dec. 18, 1996).

Finally, the Court has no duty to search the record for triable issues. *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). "The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise matter in which the evidence supports his or her claim." *Id.* A party may not rely upon "unsubstantiated assertions" as competent summary judgment evidence. *Id.*

II. AGE DISCRIMINATION

Plaintiff's allegations of discrimination are brought under the TCHRA, which is intended to carry out the policies of Title VII of the Civil Rights Act of 1964 ("Title VII") and its subsequent amendments. TEX. LAB. CODE ANN. § 21.001(1) (2002). In analyzing Plaintiff's claim under TCHRA, the Court utilizes the same analysis as provided by Title VII. *Deaver v. Texas Commerce Bank*, 886 F. Supp. 578, 586 (E.D. Tex. 1995).

To prove a *prima facie* case for age discrimination, the plaintiff must prove that (1) the plaintiff was discharged; (2) she was qualified for the position at issue; (3) she was within the protected class; and (4) she was replaced by someone younger or outside the protected group. *Sandstad v. CB Richard Ellis*, 309 F.3d 893, 896 (5th Cir. 2002) (citing *Brown v. CSC Logic, Inc.* 82 F.3d 651, 654 (5th Cir. 1996)). After the plaintiff makes the *prima facie* case, the burden of production, rather than persuasion, shifts to the defendant to proffer a legitimate nondiscriminatory reason for its decision. *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Tex. Dep't of Cmty. Affairs v.*

Burdine, 450 U.S. 248, 255-56 (1981)). If the defendant meets its burden, the presumption of discrimination created by the *prima facie* case disappears, and the plaintiff is left with the ultimate burden of proving discrimination. *Id.* (citing *St. Mary's Honor Ctr v. Hicks,* 509 U.S. 502, 511-12, (1993)).

Defendant claims that Plaintiff cannot meet the *prima facie* case because Burton was not qualified for the position, and because she was not replaced by someone outside the protected group.[2] However, assuming that Plaintiff can meet the *prima facie* case, Defendant proffers a legitimate

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[2] Plaintiff attempts to provide the Court with evidence that she was in fact qualified to do the job. This was through two performance evaluations – one from 1996, and one from February 2000. These performance reviews are not as helpful as Plaintiff contends because they predate most of Plaintiff's performance problems. Furthermore, Plaintiff asserts that Buckner was happy with her performance based on two letters of recommendation written in June of 2000. However, these letters were not written by current supervisors, but past supervisors of Burton. Thus, they are helpful to determine that at the time they supervised Burton, she was an excellent employee, but are not helpful in determining Burton's job performance during the complained of period.

Furthermore, Plaintiff contends that she was replaced by Wallie Jeffers and Jill Lewis, and claims that "both of those individuals are under 40." Dec. of Burton p 3. However, Burton offers no support for this assertion. She was not even working for Buckner at the time these two employees allegedly replaced her. Furthermore, she provides no proof that either of the individuals she claims replaced her were under the age of forty. Unsubstantiated assertions are not competent summary judgment evidence. *Grimes v. Texas Dep't of Mental Health & Mental Retardation,* 102 F.3d 137, 139 (5th Cir 1996). Felipe Garza, Vice President of Buckner testified that Wallie Jeffers eventually took Burton's position. Garza Depo. at 35. However, Jeffers is not under 40, as Plaintiff contends, but rather he was 41 at the time he was hired, making him a member of the protected class.

nondiscriminatory reason for its decision to terminate Plaintiff: consistent, documented performance problems.

As the Court previously noted, at the end of January 2000, Burton met with Weldon McElreath, a Buckner consultant, wherein Plaintiff was upset and angry, and threatened to resign if she did not get secretarial help. D's App. at 27. Plaintiff then threatened that Buckner would be unable to run the special events program without her help because her friends and contacts would pull their support if she was not in charge. *Id.* This incident was documented by Sandy Melton Stephens, Regional Director of Development for Buckner, on January 30, 2000. D's App. at 29-30.

March 29, 2000, Plaintiff met with Ken Hall, President and CEO of Buckner, and Karen Houston, Buckner's Vice President of Human Resources and Quality Assurance. The meeting was held to address "Ms. Burton's failure to be a team player and convey a positive, united image about Buckner, her anger and frustration with her job, her failure to complete her job responsibilities, and her decision to pursue her own agenda for items not approved in Buckner's budget." D's App. at 32. At this meeting, Plaintiff also informed Hall that if the golf tournament and the prom dress program were not continued, then she may not stay at Buckner. *Id.* at 33. On March 31, 2000, Plaintiff received a seven page memo documenting the March 29, 2000 meeting, which Plaintiff signed on April 4, 2000.

Additionally, JoAnn Cole, Residential Administrator for Burton, met with Plaintiff on numerous occasions to discuss performance issues before Burton was terminated. On July 21, 2000, Cole states that Cole met with Felipe

Garza ("Garza"), Vice President of Buckner, to discuss Burton's lack of availability and tardiness for scheduled appointments. On July 24, 2000, Cole met with Burton to discuss performance concerns, including Burton not retrieving nor returning phone calls, and specific problems regarding Burton's performance on a fundraiser event. On July 24, 2000, Cole provided Burton a written memo of this meeting. D's App. at 43. On July 25, 2000, Cole again met with Burton because Burton thought the issues discussed in the previous day's meeting were petty. This meeting was documented in a memo provided to Burton on August 2, 2000.

On July 26, 2000, Cole learned of Burton's request for FMLA leave. On August 4, 2000, Cole sent Burton approval for her request, which Burton signed. *Id.* at 44.

On August 4, 2000, Cole again met with Burton to discuss Buckner's unhappiness with her performance. The phone and messages issues were again discussed as well as Plaintiff's failure to obtain permission before committing Defendant to various events or donations. This meeting was documented by memo on August 7, 2000, and signed by Burton on August 8, 2000. On August 17, 2000, Cole met with Burton to discuss Burton's failure to timely send out correspondence regarding the upcoming golf tournament, part of Burton's job that was critical to the fundraiser. This meeting was documented by memo on August 18, 2000, and signed by Burton on August 21, 2000. Cole again met with Burton on August 29, 2000 to discuss Burton's failure to improve job performance. This meeting was documented by memo dated September 7, 2000, which Burton signed on September 8, 2000. *Id.* at 44-45.

It was the accumulation of these job performance problems and Plaintiff's unsatisfactory attempts to correct the deficiencies that led to Plaintiff's termination. Thus, Defendant has made an adequate showing of a legitimate, nondiscriminatory reason for terminating Plaintiff. Plaintiff has provided the Court absolutely no evidence that she was terminated because of her age. Plaintiff's subjective belief that she was terminated because of her age is insufficient to establish an issue for trial in the face of proof showing an adequate, nondiscriminatory reason for her discharge. *Portis v. First Nat'l Bank,* 34 F.3d 325, 329 (5th Cir. 1994) (citing *Elliott v. Group Medical & Surgical Service,* 714 F.2d 556, 564 (5th Cir 1983)).

Plaintiff makes a vague attempt to show pretext by stating that Defendant's evidence, including affidavits and a deposition, are not credible. As previously noted, Plaintiff suggests without foundation that Stephens' documentation of a report of a heated conversation between Plaintiff and Stephens was fabricated. The Court finds no support for this assertion.

Plaintiff also attempts to find discrepancies in Garza and Hall's depositions regarding conversations they did or did not have with each other regarding Burton's performance. When Hall was asked if he participated in any way in the decision to terminate Burton, Hall stated that he did not participate in the final decision, as that was left to Garza's prerogative. Hall's Depo. at 15. Hall was then asked if Garza conferred with him in any way before the decision was made, and Hall answered, "no." *Id.* Hall was asked if he had some ongoing conversations about what to do about Burton, and Hall responded, "not with Mr. Garza." *Id.* Conversely, Garza testifies that when Garza came to Dallas to be the Regional Director of the North

Texas Region, in April of 2000, Hall sent him a memo regarding Burton. Subsequently, Garza states that Hall later called him and gave him feedback about Burton regarding work issues, such as issues and problems with the golf tournament. Garza's Depo. at 15. Plaintiff claims that Hall testified that he never spoke to Garza, while Garza testified that he did. However, these were two completely separate time periods that Garza and Hall were discussing, and the Court finds no inconsistences therein.

Furthermore, Plaintiff calls Garza's affidavit into question because Garza states in his affidavit that he terminated Burton based on a complaint he received, but he cannot remember the name of the complaining individual. However, Plaintiff continues, Garza stated in his affidavit that he had personal knowledge of all the facts stated in the affidavit. Merely because Garza could not remember the name of the complaining individual does not mean that he does not have personal knowledge of the complaint itself. Plaintiff continues stating that in Garza's deposition, he stated that he has no personal knowledge of any of the complaints. Plaintiff is attempting to mislead the Court. Garza did not assert that he knew whether or not the substance in the complaint was true. Rather, Garza asserted that he received the complaints. He did not have personal knowledge if the information in the complaint was true, but he did have personal knowledge that he did receive the complaint.

Consequently, in the face of no evidence of discrimination and Defendant's showing of a legitimate, nondiscriminatory reason for Plaintiff's termination to which Plaintiff has provided no rebuttal of pretext, the Court GRANTS

Defendant's Motion for Summary Judgment as to its age discrimination claim.

Plaintiff also claims that because Defendant acted with malice or reckless indifference to her protected rights, that Burton is entitled to recover punitive damages. Because the Court finds that Defendant did not discriminate against Plaintiff on the basis of her age, Defendant's Motion for Summary Judgment is GRANTED as to denial of Plaintiff's claim for punitive damages in relation to her age discrimination claim.

III. FMLA

According to the Fifth Circuit, the FMLA contains two distinct provisions. "The first type of provision creates a series of entitlements or substantive rights . . . An employer must honor entitlements, and cannot defend by arguing that it treated all employees identically. . . ." *Nero v. Industrial Molding Corp.*, 167 F.3d 921, 927 (5th Cir. 1999). If the issue is the right to an entitlement, "the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer ." *Id.* The Court continued, "the second type of provision is proscriptive, and protects employees from retaliation or discrimination for exercising their rights under the FMLA." *Id.* It is not in dispute whether or not Burton was denied an entitlement or benefit provided under the FMLA. Burton gave her FMLA notice, and was granted leave. Thus, this is not a claim regarding the first provision of the Act as Plaintiff incorrectly asserts. Rather, this is a claim stemming from the second provision, a claim regarding alleged discrimination due to Burton exercising her rights under the FMLA.

Plaintiff's claim is that she was fired, or retaliated against, because she exercised her FMLA rights. The Fifth Circuit applies the *McDonnell Douglas* framework to analyze retaliation claims under the FMLA, noting that there is no significant difference between such claims under the FMLA and similar claims under other anti-discrimination laws. *Hunt v. Rapides Healthcare Sys. LLC,* 277 F.3d 757, 768 (5th Cir. 2001).

To make a *prima facie* showing of retaliation under the FMLA, Burton must show that: (1) she was protected under the FMLA, (2) she suffered an adverse employment decision, and (3) either that she was treated less favorably than an employee who had not requested leave under the FMLA, or the adverse decision was made because she took FMLA leave. *Id.* If Burton succeeds in making a *prima facie* case, the burden shifts to Buckner to articulate a legitimate nondiscriminatory or nonretaliatory reason for the employment action. *Id.* If Buckner does so, Burton must show by a preponderance of the evidence that Buckner's reason is a pretext for retaliation. *Id.*

Defendant claims that Plaintiff's *prima facie* case fails because Plaintiff does not provide evidence that she was treated less favorably than an employee who had not requested leave under the FMLA nor does she provide any evidence of any causal connection between the protected activity and the adverse employment action. Plaintiff merely states that "when Buckner fired Burton on October 25, 2000, it did so at a time when the FMLA immunized her from any adverse consequences for her absences from the workplace." P's Rsp. at 9. However, contrary to her assertions, Plaintiff is not immunized from *any* and *all* adverse employment action merely because she was taking FMLA leave. According to the Code of Federal Regulations,

"an employee has no greater right to reinstatement or other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period." 29 C.F.R. § 825.216(a). To limit an employer's ability to terminate an employee for performance issues simply because the employee requested medical leave would vest the employee with greater rights and benefits than she would have enjoyed had she continued working without requesting such leave. *Serio v. Jojo's Bakery Restaurant,* 102 F.Supp.2d 1044, 1052 (S.D. Indiana 2000). Thus, because Plaintiff cannot establish the third prong of the *prima facie* case, her FMLA claim must fail.

However, had Plaintiff proven her *prima facie* case, which the Court finds she did not, Defendant proffered a legitimate, nondiscriminatory reason for Plaintiff's termination. Plaintiff first applied for FMLA leave on July 26, 2000 and was informed of her eligibility to take such leave August 4, 2000. On October 25, 2000, Plaintiff was terminated not because of FMLA leave, but because of a long history of documented performance problems having nothing to do with Plaintiff's assertion of her FMLA rights. The Court has sufficiently expounded on Plaintiff's performance problems and history in the age discrimination section above and will not do so again here. The FMLA Regulations do no prohibit terminating an employee on FMLA leave as long as the leave is not used as a "negative factor" in employment actions. 29 C.F.R. § 825.220(c). Because there is no evidence that Defendant terminated Plaintiff because she exercised her FMLA rights, and because Defendant has proffered a legitimate, nondiscriminatory reason for Plaintiff's termination, the

Court GRANTS Defendant's Summary Judgment Motion as to Plaintiff's FMLA claim.

CONCLUSION

Accordingly, upon careful review of the parties' arguments, the summary judgment evidence, and the relevant law, for the reasons stated above, the Court GRANTS Defendant's Motion for Summary Judgment.

IT IS SO ORDERED.

Signed this 28th day of May, 2003.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES
DISTRICT JUDGE

EXHIBIT E

From: Karen Bailey
To: JoAnn Cole
Date: 11/28/00 3:00PM
Subject: Johnna Burton

JoAnn, please prepare a summary report outlining the specific job failures that led to her termination. I assume this will include the golf tourn, so please be specific about the tasks she failed to complete or did not complete as assigned. Also, include dates of discussion with her.

Ann needs this information asap so she can respond the unemployment claim.

Thanks

CC: Ann Marshall; Felipe Garza

[Handwritten Listing]

July 26, 27, 28, 31 out FMLA

August 1, 3, 8, 9, 10 out FMLA

Aug. 7 met w/ Johnna
Aug. 17 met w/ Johnna

Aug. 11 1 HR
Aug. 14 2 HRS
Aug. 18 2 HRS
Aug. 21 3 HRS
Aug. 22 5 HRS
Aug. 28 8 HRS
Aug. 31 3 HRS

Aug. 29 deadline to complete golf tournament items not done

Sept.	5	2 HRS	
	6	8 HRS	
	7	1 HRS Another meeting written warning	
	11	8 HR	
	18	HRS	
	28, 29	16 HRS PTO	
Oct.	2	PTO	Terminated
	3	PTO	Oct. 25, 2000
	4	PTO	
	5	8 HRS	Oct. 18, 2000
	6	8 HRS	eval of perf.
	9	8 HRS	not improving
	10	8 HRS	
	11	8 HRS	
	12	8 HRS	
	13	8 HR	

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOHNNA BURTON,	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO.**
BUCKNER CHILDREN AND FAMILY SERVICES, INC.	§	**3:CV-02-0415-P**
	§	
Defendant.	§	

COUNTY OF DALLAS)
)
STATE OF TEXAS)

DECLARATION OF JOHNNA BURTON

I, Johnna Burton, make the following Declaration. I am aware that this Declaration will be filed in a federal court and that it is the legal equivalent of a statement under oath. All of the matters expressed herein are true and correct and are of my personal knowledge. I am the Plaintiff in the above-styled case and I hereby state the following:

I was employed by Buck[n]er's Children and Family Services, Inc. beginning in 1995 until my termination October 25, 2000. During my employment with the Defendant, I always and consistently received excellent performance appraisals. Attached hereto as Exhibits A and B and adopted herein by reference as if set forth verbatim are true and correct copies of my performance appraisals completed by the Defendant for the calendar years 1996 and 2000. After review of the file for some strange reason there are only two in

the document production despite my five years of employment.

The performance appraisal of 1996 by most people's account would be considered outstanding. Likewise, my performance appraisal for January of 2000 which was completed by Weldon McElreath on February 24, 2000 would likewise be considered by most standards clearly above standard or above average if not outstanding.

In the beginning of the calendar year 2000, I was frustrated with the lack of clerical support that was provided by the Defendant. I contemplated a resignation but was assured that the problem could be at some point in the future addressed. After new supervision (Felipe Garza) came, the clerical assistance was not forthcoming. I did contemplate looking for other work in June of 2000. As a result, I received letters of reference from Weldon McElreath and Larry Mercer, both of my previous supervisors at Buckner. They are attached hereto as Exhibits C and D.

Unfortunately, in July of 2000, my daughter attempted suicide. Because my daughter attempted suicide, I missed a fair amount of work. In connection with my daughter's illness, which was diagnosed by a psychiatrist, I requested intermittent Family Medical Leave. In one of the Defendant's Exhibits that I have reviewed which is attached hereto as Exhibit E, I was away from work on July 26, 27, 28, 31, August 1, 3, 8, 9 and 10 on FMLA addressing issues with my daughter. To my recollection, none of the documentation that has been fostered by the Defendants in connection with their claims made in this case was prepared until after I expressed the need for Family Medical Leave.

From that point forward, I was needing intermittent Family Medical Leave to address the issues associated with my daughter's illness which included doctor visits, medication monitoring and other medical essentials.

Excluded from the Defendant's evidence that they have submitted to the Court to support their Motion for Summary Judgment are my responses to the documentation that was prepared after my request for intermittent Family Medical Leave. Attached hereto, and adopted as Exhibit F is my Response to JoAnn Cole's documentation dated August 2, 2000. The statements made in my response are true and correct under penalty of perjury and therefore the claims made by Ms. Cole are not true nor accurate. To me it is clear they are a pretext to terminate my employment because of my need for FMLA. That addresses the issues addressed in her documentation that came on July 26, 2000.

Attached hereto as Exhibit G is a document dated August 4, 2000 addressing an alleged complaint by Dana Hamilton. From my discussion with Ms. Hamilton, it was a non-issue contrary to the knitpicking voiced in the documentation. At the request of the Defendant, I also prepared an overview of the Director of Community Relations. I did that at their request. It is attached hereto as Exhibit H.

My daughter's attempted suicide in July of 2000, is what prompted my need for intermittent FMLA which occurred in July 2000. Then in late September 2000, unfortunately my daughter again attempted suicide and was out of town when she attempted it. She went to a hotel in Corpus Christi alone. I was away from work from

September 28, 2000 periodically, through October 25, 2000 attending to my daughter's needs. At that period of time, I was on intermittent Family Medical Leave. I did return to work approximately October 15th, 16th or 18th, but have no recollection of a memo from JoAnn Cole and do not remember signing a copy of a memo dated October 18, 2000. Any issues that are alleged to have arisen during that period of time are issues that arose while I was away on Family Medical Leave and were not discussed with me.

On October 12, 2000 I was requested to complete another certification for FMLA by my daughter's physician. I was permitted 15 days to have them completed. I had the form completed and was going to turn it in by the due date, but I was fired by Felipe Garza two days before the form was due. The letter is attached hereto as Exhibit I.

I have attended all of the depositions that have been taken in connection with this case. On the one hand Mr. Garza says in his deposition on Page 15 that he did not know personally any of the issues that led to my discharge. He said that he relied upon JoAnn Cole in connection with the investigation.

I was replaced by Wallie Jeffers and Jill Lewis. Both of those individuals are under 40 and to my knowledge have never sought Family Medical Leave for any reason.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed this 1st day of May, 2003.

/s/ Johnna Burton
Johnna Burton

(3)

No. 04-508

Supreme Court, U.S.
FILED
NOV 15 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOHNNA E. BURTON,

Petitioner,

v.

BUCKNER CHILDREN & FAMILY SERVICES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did this Court's decisions in *Desert Palace* and *Reeves* blur or erase the distinction between "mixed motive" and "pretext" cases or change the evidentiary burdens or analysis to be applied?

2. If a non-movant's evidence is circumstantial, do the requirements of Federal Rule of Civil Procedure 56 regarding the nature and quality of the evidence not apply?

3. Do determinations of the quality of a non-movant's evidence, *e.g.*, whether it is affirmative, probative and proper under Federal Rule of Civil Procedure 56, weigh the evidence or constitute credibility determinations?

4. Are the district and appellate courts required to set out in detail the non-movant's evidence and explain why it fails to constitute sufficient, probative evidence or to raise a genuine issue of material fact?

5. Should this Court accept Petitioner's challenge "to delineate what is or is not a case that will survive summary judgment," *i.e.*, resolve prospectively in what circumstances the evidence is sufficient?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Buckner Children & Family Services, Inc., a non-profit corporation, has the following parent:

Buckner Baptist Benevolences

No other publicly held company owns 10% or more of them.

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STATEMENT OF THE CASE

Petitioner, Johnna E. Burton (Burton) sued Buckner Children & Family Services, Inc. (Buckner) claiming that the termination of her employment was age discrimination in violation of Section 21.051 of the Texas Commission on Human Rights Act ("TCHRA") and violated 29 U.S.C. § 2615 of the Family and Medical Leave Act ("FMLA"). Buckner moved for summary judgment on all of Burton's claims. The district court granted Buckner's motion on Burton's age discrimination claim because there was no evidence of discrimination and Burton provided no rebuttal of pretext to Buckner's showing of a legitimate, nondiscriminatory reason for terminating Burton. (App. p. 14). The district court granted Buckner's motion as to Burton's FMLA claim because Burton failed to provide evidence to establish a *prima facie* case and because Buckner proffered a legitimate nondiscriminatory reason. (App. p. 17).

The Fifth Circuit affirmed the grant of summary judgment in Buckner's favor on Burton's age discrimination claim, holding that Buckner established that Burton was dismissed for inadequate performance and that the alleged discrepancies in Buckner's summary judgment evidence were not supported by Burton's evidence or were so trivial as to be immaterial. (App. p. 3). With respect to Burton's FMLA claim, the Fifth Circuit affirmed the summary judgment because Burton failed to establish a *prima facie* case and failed to create a genuine issue of material fact with respect to Buckner's legitimate nondiscriminatory reason for terminating her employment. (App. p. 3-4).

STATEMENT OF FACTS

Burton was hired part-time in the mid-1990's and later was hired full-time as Special Events Coordinator. (R. 99). Burton was terminated on October 25, 2000 due to consistent, documented performance problems. (R. 104-124, 136-138). These problems included not complying with Buckner's policies and procedures, not completing assigned tasks (either on time or at all), not showing up for scheduled appointments with staff and external constituents, a negative attitude, excessive absences, threatening to quit on numerous occasions, and not reflecting the team values that Buckner expected from a person in Burton's position. (R. 109-127, 131-138). On at least eight separate occasions between January of 2000 and October 18, 2000, Burton was given notice and ample opportunity to improve her job performance. (R. 104, 113, 125, 131, 133, 134). When the problems were not corrected, her employment was terminated. (R. 136-138).

MISSTATEMENTS OF FACT AND LAW

In her statement of facts and throughout her petition, Burton makes several misstatements of fact. These are:

1. There is no direct evidence of FMLA discrimination.

The evidence that Burton characterizes as "direct" evidence, and on which she relies throughout her petition, are handwritten notes. She states these notes were prepared by JoAnn Cole and prepared by Cole as a listing of Burton's job failures in response to an email request from Karen Bailey. See Pet. pp. 6, 12, 14, 15, 22 (App. pp. 19-20).

However, there is no evidence in the record that these notes were prepared by Cole or that, even if prepared by Cole, they were in response to Bailey's request or are a listing of Burton's job failures. Burton took the depositions of JoAnn Cole and Karen Bailey (Houston) and submitted portions of them in support of her response to Buckner's motion for summary judgment. However, none of that deposition testimony, nor any other evidence, established the authorship or the purpose of the handwritten notes.

2. Two people were not hired to replace Burton.

Burton states she was replaced by two people. See Pet. p. 8. In her declaration, Burton made the conclusory allegation that she was replaced by two people both under the age of 40. (R. 172). Burton was not working at Buckner when Wally Jeffers and Jill Lewis were hired and failed to show any basis for personal knowledge of who replaced her or his/her/their ages. Burton's admissions and other responsive summary judgment evidence show that Jeffers (41 years of age when hired) replaced her and that Lewis was hired as the Volunteer Coordinator, a position Burton supervised when she was employed by Buckner. (R. 186, 194, 203, 212, 213, 222, 228).

3. Burton's job performance problems predated her exercise of FMLA.

Burton notified Buckner of her need for FMLA leave on July 26, 2000. She did not, as she states, perform admirably up until that time. See Pet. pp. 8, 12. Burton completely fails to apprise this Court of meetings held with her in January and March of 2000, in which many of the same problems documented in the July, August and

September 2000, memoranda were discussed with her. (R. 104-110, 113).

4. No inconsistent reasons were given as to why Burton was terminated.

In discussing the Fifth Circuit's alleged application of an improper standard, Burton appears to assert that the evidence showed varied reasons were given by Buckner's employees for her discharge. See Pet. pp. 8, 16. There is no evidence that Burton was discharged other than for consistent job performance problems, and none of the deposition testimony of Buckner's employees, offered by Burton in response to Buckner's motion for summary judgment, contains any other reason.

In her questions presented and throughout the petition, Burton makes arguments and raises issues that are not properly before the Court. These are:

1. This is not a mixed-motive case or direct evidence case. In her Question No. 6, Burton poses a question regarding this Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). This is the only place in her petition in which she refers to *Desert Palace* or to mixed-motive. However, in several of her questions and in her petition, Burton refers to "direct" evidence of improper motive.

The parties and the courts below treated this as a "pretext" case, applying the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 248, 67 L.Ed.2d 207 (1981). This was the correct analysis inasmuch as there is no evidence that the decision to

terminate Burton was based on legitimate *and* illegitimate reasons. Indeed, Burton has consistently contended that Buckner had no legitimate reason to terminate her employment.

There is nothing in this Court's decision in *Desert Palace* that suggests that the distinction between "mixed-motive" and "pretext" cases recognized by this Court in *Price Waierhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 286 (1989), has disappeared or that the *McDonnell Douglas* burden-shifting scheme no longer exists.

2. There is no evidentiary issue with respect to discriminatory statements.

In her argument at page 20 of her petition, Burton argues that a plaintiff's affidavit suffices to defeat summary judgment and cites cases which leave the impression that her declaration contained testimony as to statements made by Buckner.

While an employee's testimony regarding an employer's statements is not considered subjective belief and is considered direct evidence, *Fierros v. Texas Dept. of Health*, 274 F.3d 187, 195 (5th Cir. 2001), Burton's declaration contains no testimony regarding discriminatory statements by Buckner.

REASONS FOR DENYING THE WRIT

1. The Fifth Circuit's opinion does not conflict with this Court's opinion in *Reeves* or with other opinions from the Fifth Circuit or other Circuits.

In its opinion, the Fifth Circuit held that summary judgment was proper on Burton's age discrimination

claims because Burton's attempts to cast doubt upon Buckner's stated reason for her dismissal were either unsupported by the record or were so trivial as to be immaterial. (App. p. 3). With respect to Burton's FMLA claim, the Fifth Circuit affirmed the summary judgment granted in favor of Buckner, holding that Burton did not make a *prima facie* case of discrimination under the FMLA and that, even if she had, she failed to create a genuine issue of material fact. (App. pp. 3-4).

While the Fifth Circuit did not do an exhaustive analysis of *Reeves* in its opinion, it referred to and relied on the decision of this Court in reviewing the matter before it. The opinions from the Fifth Circuit and other Circuits that Burton cites as being in conflict with the decision here show no conflict with the legal principles by which the courts below reviewed the evidence and rendered their decisions. The only difference between those cases and this one is that the litigants in the other cases offered sufficient *competent* summary judgment evidence to raise a fact issue. Burton did not do so and rather than present this Court with any compelling reason for review, simply reargues her case. However, the record establishes that this is one of those cases recognized by this Court, and the lower courts, where no rational factfinder could conclude that discrimination occurred. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 2109, 147 L.Ed.2d 105 (2000).

2. This Court's opinion in *Reeves* did not lessen or alter the quality or nature of proof required to raise a fact issue.

Both the district court and the Fifth Circuit held that Burton's allegations of discrimination and falsity and

pretext were not supported by evidence or were based on subjective belief, conclusion and speculation or created only immaterial issues. Burton argues that the lower courts misapplied the standard of review. However, the standard of review does not require that courts accept less than competent, *i.e.*, affirmative, probative, summary judgment evidence.

A non-movant's burden is not satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to material facts, or a scintilla of evidence. *Douglass v. United Serv. Auto Ass'n*, 65 F.3d 452, 459 (5th Cir. 1995); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*). A plaintiff cannot rest on her allegations to get to a jury without "any significant probative evidence tending to support the complaint." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Likewise, testimony based on conjecture or speculation is insufficient to raise an issue of fact to defeat a summary judgment motion. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. . . . If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50.

In *Reeves*, this Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." 530 U.S. at 148. Proof that the employer's explanation is unworthy of credence is simply one form of circumstantial evidence. *Id.* at 147. This Court did not hold that this proof did not have to meet the standards of Rule 56.

3. The Fifth Circuit did not misapply the standard for review of summary judgment.

Rule 56(c) of the Federal Rules of Civil Procedure provides that a summary judgment shall be rendered when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Only disputes over material facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. To avoid summary judgment, the non-movant must go beyond the pleadings and by competent summary judgment evidence set forth "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

The standard for review of a grant of summary judgment is well-established. The Court must review the record as a whole, drawing all reasonable inferences in favor of the non-movant and must not make any credibility determinations or weigh the evidence. *Reeves*, 530 U.S. at 150.

Initially, Burton seems to insist that a court may not consider an employer's evidence regarding the reason for termination at all because it comes from interested witnesses. This, however, confuses the standard of review with the employer's burden under the *McDonnell Douglas* burden-shifting analysis.

McDonnell Douglas and subsequent decisions "established an allocation of the burden of production and an order for the presentation of proof in . . . discriminatory-treatment cases." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

First, the plaintiff must establish a *prima facie* case of discrimination. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. at 252-253. The burden then shifts to the employer to "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Id.* at 254. At this stage, the burden is one of production, not persuasion. In other words, does the evidence show a legitimate nondiscriminatory reason? See *Raytheon Company v. Hernandez*, 540 U.S. 44, 124 S.Ct. 513, 519, 157 L.Ed.2d 357 (2003).

In this case, Buckner produced affirmative, probative evidence establishing that Burton was terminated for performance problems. In January 2000, almost nine months before she was terminated, Buckner's Regional Director of Development had a meeting with Burton. Burton was angry, frustrated, threatened to resign if she did not receive more assistance to perform her job and threatened that if she left her friends and contacts "would pull their support if she was not in charge." (R. 104-108). This meeting was documented in a January 30, 2000 memorandum. (R. 107, 108).

On March 29, 2000, Buckner's President/CEO and the Vice President of Human Resources and Quality Assurance met with Burton to discuss her poor job performance and her failure to complete her job responsibilities. (R. 109, 110). Burton received, edited and signed the March 31, 2000 memorandum of this meeting, which discussed and summarized her performance problems and issues. (R. 113).

On July 21, 2000, Cole met with Felipe Garza, Burton's supervisor, to discuss issues relating to Burton's lack of availability. (R. 121). As a result of this meeting, Cole

and Burton met on July 24, 2000, and discussed numerous performance deficiencies. (R. 121, 125). On July 25, 2000, Burton and Cole met again because Burton thought the concerns expressed in the July 24th meeting were "petty and that she was offended." (R. 121, 127). Burton responded to the concerns about her job performance that were raised in the July 24th meeting by a memorandum she prepared, dated August 2, 2000. (R. 191-192).

On August 4, 2000, another meeting was held with Burton. This meeting addressed Buckner's continued unhappiness with Burton's level of availability to and response to volunteers, donors, and co-workers, and her failure to obtain approval before committing to special events or major donations to campus programs. (R. 122, 131, 132). Cole prepared a memorandum of the meeting, dated August 7, 2000, which Burton signed. (R. 131, 132). On August 17, 2000, yet another meeting occurred to discuss Burton's failure to timely send out letters regarding a fund-raising event, which was part of her job responsibilities. (R. 122, 133). Burton was given a deadline to complete and turn in a project list related to the event, which she failed to meet. (R. 133, 134).

The recurring problems with and complaints about Burton ultimately led Mr. Garza to the decision to terminate Burton's employment. (R. 137-138). Job performance problems and failures are a legitimate reason for termination of employment. See *Reeves*, 530 U.S. at 142 (failure to comply with job responsibilities).

The remainder of Burton's arguments relate to her claim that under the correct standard of review, there are genuine issues of material fact precluding summary

judgment. However, the record does not support this claim.

4. Under the standard of review for summary judgment, there is no issue of material fact.

Buckner moved for summary judgment on the grounds there was no evidence of essential elements of Burton's *prima facie* case of age discrimination. However, the district court assumed, without deciding, that Burton could make a *prima facie* case of age discrimination. (App. p. 10). The Fifth Circuit did not address whether Burton made a *prima facie* case, holding summary judgment was proper because Burton's allegations were not supported or the alleged discrepancies in Buckner's evidence were so trivial as to be immaterial. (App. p. 3).

To establish a *prima facie* case Burton had to prove: (1) she was discharged; (2) she was qualified for the position at issue; (3) she was within the protected age class (over 40 at the time); and (4) she was replaced by someone younger or otherwise discharged because of her age. *Reeves*, 530 U.S. at 142. Burton offered no competent summary judgment evidence that she was discharged because of her age. Her declaration that she "was replaced by Wallie [sic] Jeffers and Jill Lewis [and] those individuals are under 40" is simply conclusory. Burton did not set out, and there is no evidence of, the basis for personal knowledge as to the people who replaced her or their ages. (R. 172).

Burton admits now that one of those who allegedly replaced her, Wally Jeffers, was over 40. See Pet. p. 8. As to Jill Lewis, Burton's own summary judgment established that Lewis did not replace Burton as she represents to this

Court. Lewis was hired as the Volunteer Coordinator. (R. 228). This position existed prior to Burton's termination and it was part of Burton's job to supervise the Volunteer Coordinator. (R. 186, 194, 213, 218). Burton's other evidence established that Jeffers was hired to fill her position. (R. 203, 212, 213, 222).

Buckner also moved for summary judgment on the grounds there was no evidence of essential elements of Burton's *prima facie* case of discrimination because of her FMLA leave. Both the district court and the Fifth Circuit held that Burton failed to establish her *prima facie* case. (App. pp. 4, 17).

To establish a *prima facie* case under the retaliation and discrimination provisions of 29 U.S.C. § 2615, Burton had to show that: (1) she engaged in an activity protected by the FMLA, such as taking or requesting leave; (2) an adverse employment action occurred; and either (3a) she was treated less favorably than an employee who had not requested FMLA leave or (3b) the adverse decision was made because she took FMLA leave. *Hunt v. Rapides Healthcare System, LLC*, 277 F.3d 757, 768 (5th Cir. 2001).

Burton was granted FMLA leave, effective July 26, 2000. (R. 128-130).[1] Burton offered no evidence that she

[1] Burton takes issue with the district court's conclusion that Buckner learned of Burton's request for FMLA leave on July 26, 2000 because Cole testified only that she received a call "toward the end of July" from Burton. See Pet. p. 16. She argues that one could conclude Buckner learned of her request before July 26th because Burton was not at work that day. See Pet. p. 16. However, the Employer Response, signed by Burton on August 4, 2000, states that she notified her employer on July 26, 2000 of the need for leave. (R. 128-29). That Cole could not recall the exact date she learned of Burton's request does not raise an issue of material fact.

was treated less favorably than an employee who had not requested leave under the FMLA. The only reference in the record to any other employee and FMLA was Burton's declaration where she stated "I was replaced by Wallie [sic] Jeffers and Jill Lewis. Both of those individuals . . . to my knowledge have never sought Family Medical Leave for any reason." (R. 172). In her petition in this Court, Burton attempts to compare herself to Cole. However, as noted by the Fifth Circuit, there is no evidence that Cole had never used FMLA leave or that Cole's infraction was nearly identical to Burton's infractions for which her employment was terminated. (App. 3-4). Burton takes issue with the Fifth Circuit's "nearly identical" language and appears to construe this as an imposition by the Fifth Circuit of a requirement that the plaintiff and the employee to whom comparison is made be identically situated (or nearly so) in every single aspect of their employment. See Pet. p. 23.

In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 283, n. 11, 96 S.Ct. 2574, 2580, 49 L.Ed.2d 493 (1976), this Court, addressing claims of racial discrimination based on the disparate treatment of employees for the same infraction, noted that "precise equivalence in culpability" is not the question and reaffirmed that allegations of disparate treatment for acts of comparable seriousness was adequate to plead an inferential case that the employer's reliance on the employee's misconduct as grounds for discharge was pretext. See *McDonnell Douglas*, 411 U.S. at 804.

Burton contends that she "demonstrated that JoAnn Cole committed job failures but nevertheless received no discipline" or documentation. See Pet. pp. 16, 23. What Burton showed was that Cole was verbally counseled by

her supervisor regarding Cole's failure to timely respond to emails. (R. 220-1). This infraction is hardly comparable in seriousness to those of Burton for which her employment was ultimately terminated.

The Fifth Circuit did not compare job functions or responsibilities but infractions as this Court has instructed and Burton has presented no issue to this Court regarding comparator evidence and failed to make a *prima facie* case of discrimination because of her FMLA leave.

Although the district court and the Fifth Circuit held that Burton failed to make a *prima facie* case of discrimination under the FMLA, and the district court assumed she had made such a showing in her age discrimination claim, they each also held that Burton failed to create a genuinely contested issue of material fact with respect to Buckner's legitimate nondiscriminatory reasons for terminating her employment. (App. 4, 17).

If a plaintiff makes a *prima facie* case of discrimination, the burden of production shifts to the defendant to articulate a legitimate nondiscriminatory reason for its decision. *McDonnell Douglas*, 411 U.S. at 802. If the defendant meets its burden, the discrimination presumption disappears, and the plaintiff bears the burden of proof of intentional discrimination and of demonstrating that the defendant's reason is pretextual. *Reeves*, 530 U.S. at 142; *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 738 (Tex. 2003). However, an employer is entitled to summary judgment if the plaintiff creates only a weak issue of fact that "the employer's reason was untrue and there is abundant and uncontroverted evidence that no discrimination occurred." *Reeves*, 530 U.S. at 148.

There is no evidence of discriminatory animus. Furthermore, mixed-motive was not an issue below. Burton focuses and focused her arguments on the alleged falsity of Buckner's summary judgment evidence and reasons for Burton's dismissal. The matters which Burton claims create a "suspicion of mendacity" appear to be: (1) questions regarding when certain documents may have been created; (2) questions regarding whether meetings did or did not occur; and (3) discrepancies between two witnesses' testimony. However, under the evidence, it is clear that Burton's dismissal had nothing to do with her age or her exercise of FMLA rights.

Burton represents to this Court that she performed admirably until she exercised FMLA in July of 2000 and that the first piece of disciplinary paperwork was allegedly prepared on July 24, 2000. However, Buckner's summary judgment evidence established that in January 2000, almost nine months before her employment was terminated, Buckner's Regional Director of Development met with Burton. Burton has never disputed that she had this conversation with the Regional Director or that she was upset and angry and made demands and threats as documented. (R. 105, 107, 108).

On March 29, 2000, Buckner's President and CEO and the Vice President of Human Resources and Quality Assurance met with Burton to discuss her poor job performance and her failure to complete her job responsibilities. (R. 109, 110). Again, Burton does not dispute that this meeting occurred or that Buckner's concerns about her conduct and attitude were expressed and addressed in March of 2000.

As noted above, beginning on July 24, 2000, Cole met with Burton several times to discuss numerous performance deficiencies and Cole documented each meeting. Burton questions whether any memorandum not bearing her signature existed prior to her dismissal or her bringing suit. However, this is only speculation on Burton's part. In some cases Burton seems to intimate that a meeting between her and Cole did not occur. However, Burton's own summary judgment evidence established that meetings did occur. Burton's August 2, 2000, memorandum to Cole specifically refers to the July 24, 2000 meeting. (R. 191-192). Further, Cole's memorandum of August 7, 2000, which Burton signed, also refers to their July 24, 2000 meeting. (R. 131).

While Burton may speculate on whether a document existed on a certain date, she cannot dispute that Buckner's concerns about her job performance were raised and communicated to her prior to July 26, 2000. Burton's own August 2, 2000 memorandum addressed the concerns raised in the July 24 2000, memorandum, almost point for point. (R. 125-126, 191-192). Many of these same concerns were addressed in the March memorandum. (R. 113).

The recurring problems with and complaints about Burton ultimately led Garza to the decision to terminate Burton's employment. (R. 137-138). It is Garza's receipt of complaints about Burton that forms the basis of her argument that Garza's and Hall's testimony are in such conflict that one of them must be lying. See Pet. pp. 13, 24. Contrary to Burton's statements, Hall did not deny having conversations with Garza. (R. 199, 202). Hall testified he informed Garza of ongoing issues with Burton when Garza first came on. (R. 199). Garza confirmed this. (R. 206-207). Hall testified he communicated complaints about the golf

tournament to Garza. (R. 199). Garza confirmed that Hall called and gave him feedback on issues relating to the golf tournament. (R. 207-208). The lower courts clearly reviewed all of the evidence Burton offered in response to Buckner's motion for summary judgment. The evidence simply does not support Burton's arguments or her claims.

Burton's employment was terminated solely for performance reasons. No disciplinary action, including but not limited to her dismissal, was taken against Burton because of her age or her assertion of any FMLA rights and the district court correctly granted summary judgment in favor of Buckner and the Fifth Circuit correctly affirmed the summary judgment.

5. The standard for granting summary judgment is well-established and there is no need to resolve prospectively in what circumstances the evidence is sufficient to create a fact issue.

Burton asks this Court "to delineate what is and what is not a case that would likely survive summary judgment." See Pet. p. 21. However, this Court has declined to do so, stating:

> Whether a judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of any proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for summary judgment as a matter of law. . . . For the purposes of this case, we need not – and could not – resolve all of the circumstances in which such factors would

> entitle an employer to judgment as a matter of law.

Reeves, 503 U.S. at 148-149. Likewise, there is no need for the purposes of this case to set out what evidence will raise a fact issue precluding judgment as a matter of law in every employment discrimination case.

CONCLUSION

Respondent Buckner Children & Family Services, Inc., prays that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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In The Supreme Court of the United States

JOHNNA E. BURTON,

Petitioner,

vs.

BUCKNER CHILDREN & FAMILY SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF FOR PETITIONER

Burton's petition presents clear evidence the Fifth Circuit and the trial court failed to consider Burton's summary judgment evidence in the light most favorable to her non-movant position in the summary judgment setting. Rather than address, the failures of the Fifth Circuit and the trial court Buckner has attempted to once again ignore the direct evidence of FMLA discrimination/ retaliation and argues the evidence in the light most favorable to their own position without ever attempting to address the direct evidence. Buckner claims the Petitioner, Burton has misstated the facts and law, without ever addressing the interplay between The Supreme Court's decision in *Desert Palace, Inc. v. Costa,* 123 S.Ct. 2148 (2003) and 29 C.F.R. § 825, Family and Medical Leave Act. The obvious reason is there is no way to explain away the evidence, which if it had been given proper weight and consideration, would have defeated summary judgment and which, probably would result in judgment as a matter of law.

There are no misstatements as claimed and will be demonstrated in the same order as erroneously claimed by Buckner.

NO MISSTATEMENTS OF FACT OR LAW

1. There is direct evidence of the FMLA discrimination.

The notes from JoAnn Cole were authenticated by Burton in her declaration, which was never objected to by Buckner and was before the trial court and the Fifth Circuit. Moreover as conceded in Buckner's Brief in

Opposition, page 2, Burton was terminated for alleged excessive absences. All of the absences attributed to Burton, which preceded her termination, were protected absences. Burton began FMLA leave July 26, 2000 and was on protected leave and subsequently intermittent leave all of which were protected as indicated. Buckner has never claimed any of the absences were for anything other than protected periods. As such, the claim Burton was fired for absences is direct evidence apart from the smoking Howitzer authored by JoAnn Cole in response to the inquiry from the Vice President of Human Resources. (App. pp. 19-20)

2. Two people did assume the responsibilities previously performed by Burton.

Burton's position was that of Director of Community Relations. (R. 194) Burton's responsibilities were initially assumed by Sandy Melton until Wally Jeffers and Jill Lewis were hired. (R. 212) Jeffers was hired as Special Events Coordinator in February 2001. (R. 201) Lewis was hired in January 2001 as Volunteer and Special Events coordinator. (R. 228). Burton's job responsibilities as described encompassed the tasks assumed by Jeffers and Lewis. (R. 194-95). Apparently it required two younger workers to perform the tasks previously performed by Burton.

3. Burton's alleged job performance problems did not predate the FMLA protection.

Burton was appraised by Weldon McElreath on February 24, 2000. (R. 177-78) The worst score on 13 categories of review was average. That score was attributed to four categories. All other ratings were above average with the

exception of one which was attitude and Burton was rated far above standard. Buckner claims Burton fails to apprise the Court of some alleged issue in January 2000. There was no issue other than Burton was in need of assistance which was not forthcoming. The meeting in March 2000 with Ken Hall, president, was not disciplinary even by Buckner's questions regarding the document. The memo was nothing more than an explanation of Burton's concerns on Buckner's direction and the explanation that Garza would be assuming the new position. (R. 96-98). Cole's outline of job failures begins with the first date of FMLA. An impartial fact finder could easily conclude from Cole's own hand there were no issues that preceded the FMLA leave. Again, Buckner like the courts below fails to recognize the evidence must be considered in the light most favorable to the non-movant.

4. The reasons for termination varied widely.

Cole claimed she was not involved in the decision to terminate and was never advised of the reason by Garza. (R. 216 & 222) Cole also admitted the decision may have been made while Burton was on FMLA leave. (R. 221) Cole claimed she was never advised of the reason for discharge by Garza (R. 222)

Garza claimed in his deposition that Burton was terminated because he kept getting calls from the president, Ken Hall. (R. 209). Of course his affidavit was different. (R. 136-38) Contrary to Cole, Garza claimed he told Cole of the reasons for the termination. (R. 211). Garza admitted he held no personal knowledge regarding the verity of the complaints. (R. 211) Strangely, Cole was responsible for documenting the alleged issues and would have been responsible for investigating the alleged complaints. (R. 211).

Ken Hall claimed Burton was fired for incompetence and not fulfilling the obligations of her job. (R. 197). Hall claimed the issues arose two and a half years prior to the discharge which, of course, is belied by all previous supervisors' reports. Hall claimed he had no ongoing conversations with Garza about what to do with Ms. Burton. (R. 199). Conversely, Garza testified, "I kept getting calls about issues and complaints, calls from the President. . . ." (R. 209) Hall was asked: "I mean did you have some ongoing conversations about what to do about Ms. Burton?" Answer: "Not with Mr. Garza." (R. 199). The varying reasons, persons involved and processes lead to the image of everyone finger pointing at each other. Also, this is a small sampling of the numerous credibility problems with Buckner's witnesses.

5. Mixed Motive is part of the case because of the CFR.

Rather than address the Code of Federal Regulations and the consideration of the protected absences in the decision to fire Burton, Buckner claims this was treated as a pretext case. The reasons advanced were pretextual and were refuted. Moreover it was repeatedly pointed out that the absences were considered and therefore the motion should have been denied and the Fifth Circuit should have reversed. Rather than address the evidence at all, the Fifth Circuit tersely concluded that the evidence offered by Burton was so ***trivial as to be immaterial.*** (Opinion p. 3) The Fifth Circuit maintained the evidence was in essence commonplace and ordinary. That is a weighing of the evidence at a minimum. The evidence was anything but commonplace. It was direct and damning. From the Circuit opinion this Court would likely think there was no evidence offered by Burton to oppose the summary judgment. That was simply not the case.

CONCLUSION

For these reasons and for those in the petition, the petition for certiorari should be granted, the judgment of the Court of Appeals vacated, and the case remanded to the trial court.

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